



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 18, 1996

Mr. William S. Nail  
General Counsel  
Employees Retirement System of Texas  
P.O. Box 13207  
Austin, Texas 78711-3207

OR96-2132

Dear Mr. Nail:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 101805.

The Employees Retirement System of Texas (the "system") received an open records request for "Schedules A and B, HMO's Group Health Care Agreement or Certificate of Coverage, Trustee Rules, and Application to Provide Health Care Services" regarding a "Letter of Agreement" between Prudential Health Care Plan, Inc. ("PruCare") and the system. You state that you are providing the requestor with some of the requested information but that you will not release other information designated by PruCare as proprietary, pending a decision from this office.

Pursuant to section 552.305, this office notified PruCare of the open records request. *See Gov't Code § 552.305; Open Records Decision No. 542 (1990).* PruCare responded to our notification by asserting that Schedule A and the Application to Provide Health Care Services constitute trade secret or commercial or financial information which should not be disclosed pursuant to section 552.110 of the Government Code.<sup>1</sup> Thus, any other information responsive to the request must be released to the requestor.

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<sup>1</sup>As you have not provided a copy of Schedule A to this office for review, this ruling does not address whether Schedule A must be withheld under section 552.110.

Section 552.110 excepts from disclosure trade secrets and commercial or financial information obtained from a person and confidential by statute or judicial decision. Section 552.110 is divided into two parts: (1) trade secrets and (2) commercial or financial information, and each part must be considered separately.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Restatement of Torts § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

The following criteria determines if information constitutes a trade secret:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS, *supra*; *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

This office will accept a claim that information is excepted from disclosure under the trade secret aspect of section 552.110 if a prima facie case is made that the information is a trade secret and no argument is submitted that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990) at 5; *see* Open Records Decision No. 542 (1990) (governmental body may rely on third party to show why information is excepted from

disclosure). In this instance, we conclude that PruCare has established a prima facie case that the some of the contents of the application is trade secret information which must be withheld under section 552.110.

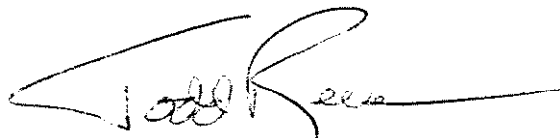
Section 552.110 also excepts from disclosure commercial or financial information obtained from a person and confidential by statute or judicial decision. In Open Records Decision No. 639 (1996), this office established that it would follow the test articulated in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) for judging the confidentiality of "commercial or financial information." Under *National Parks & Conservation Ass'n*, such information is confidential

if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

498 F. 2d at 770 (footnote omitted). In addition, "[t]o prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted). We believe that PruCare has established that it actually faces competition and that release of the information would likely cause substantial harm to its competitive position. Therefore, all of the information submitted to this office must be withheld under section 552.110 as either trade secret or commercial or financial information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Todd Reese", with a long horizontal flourish extending to the right.

Todd Reese  
Assistant Attorney General  
Open Records Division

RTR/rho

Ref.: ID# 101805

Enclosures: Submitted documents

cc: Ms. Beverly K. Swift  
1704 Parkside Lane  
Austin, Texas 78745  
(w/o enclosures)